MATERIALS FOR THE LUCASVILLE REBELLION:
INFORMANTS, PERJURY AND THE SEARCH FOR TRUTH
OPD Seminar October 16, 2009 Helena, MT
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A. Challenging Informants

1. Discovery and Investigation of the Informant

a. Discovery motion

b. Criminal record

c. Investigate background (family, marital, employment, education, military, financial)

d. Prior statements (Kyles v. Whitley, 514 U.S. 419, 433 (1995))

e. Plea Agreements

f. Sentencing Judgments

g. Incentives to cooperate including dismissed charges, money, letters, immunity or otherwise, from the prosecution or case agents

h. Presentence Investigation Reports

I. Incident reports for uncharged behavior

j. Prior cooperation

k. Drug usage and treatment

l. Possessions such as expensive car

m. Medical issues - poor eyesight, hearing loss, learning disability, brain damage, mental impairment

n. Polygraph results

o. Character and reputation

Move for and obtain the Informant's file kept by the drug agents. From this file, you are entitled, at a minimum, to:

a. a copy of the Informant's agreement to cooperate

b. all debriefing reports

c. monies and considerations received in this and in all other cases

d. consideration for others, e.g., family members

e. expectations at sentencing

f. personal history information

2. Determine all the reasons the Informant has to lie

3. During voir dire, ask the potential jurors about their attitudes towards informants and whether they would convict a family member or friend based on an informant's word

4. Set the stage during your Opening Statement

5. Cross-Examination

a. Establish that nothing the Informant says can be corroborated

b. Pick apart the Informant's ability to provide specifics, e.g., lack of memory

c. Prove that the Informant is addicted to drugs and was under the influence of drugs

d. Go into specific information, obtained by discovery and investigation, which may question or attack the Informant's credibility

e. Present the fact that the Informant's testimony is being purchased by the government by establishing the provisions of the plea agreement and how the Informant has been or will be rewarded for his "cooperation" (detail the deal)

1) What the reward is

2) What he has to do to get the reward

To build an argument for your summation to explain why the Informant is motivated to testify falsely to gain the reward

f. If supported by the facts, establish that your client was a minor player as compared to the Informant or others involved

1) Make the informant appear to be more culpable than your client

2) Establish that your client was not present or merely present

g. If one or more aspects of the Informant's story can be contradicted by other evidence, e.g., testimony form a law enforcement agent, lock the Informant into his version of the story to set up impeachment (see below)

h. Anything going on in Informant's life, e.g., sick parent, new child, that would be incentive for lying or embellishing his story

I. "The Ten Commandments of Cross-Examination" by Irving Younger (from Trial Techniques with Irving Younger, National Practice Institute (1978):

1) Be brief
2) Use plain words
3) Ask only leading questions
4) Ask only questions to which you already know the answers
5) Listen to the answer
6) Do not quarrel with the witness
7) Do not permit the witness to simply repeat what he said on direct exam
8) Never permit the witness to explain anything
9) Avoid one question too many
10) Save the main point for summation

j. "Extensive cross-examination of a government witness designed to reveal any biases or prejudices of the witness is compelled by the confrontation clause. Especially should great latitude be allowed when, as here, the key prosecution witness is also a professional informant." United States v. Alvarez-Lopez, 559 F.2d 1155, 1160 (9th Cir. 1977).

6. Present evidence during the cross-examination of other government witnesses or during the defense case to contradict the Informant and to prove the Informant to be a liar

7. Prepare and submit appropriate jury instructions wherein the Court instructs the jury to evaluate the Informant's testimony with great caution

8. Tie it together during your summation

9. Helpful case: United States v. Schoneberg, 396 F.3d 1036 (9th Cir. 2005)

B. Impeachment by Use of Prior Inconsistent Statements

1. From the Introduction to James Carey, "Charles Laughton, Marlene Dietrich and the Prior Inconsistent Statement", Vol. 36 Loyola University Chicago Law Journal 433 (2005):

> In the movie, *Witness for the Prosecution*, Charles Laughton plays a defense barrister in a murder case. On cross-examination, he confronts Marlene Dietrich, a key prosecution witness, with her own letters contradicting her direct testimony. The letters destroy her credibility. The confrontation is the denouement of the trial, but not of the movie. We learn after the trial that Dietrich contrived the letters herself, enabling Laughton to destroy her in front of the jury, thereby gaining an acquittal for the defendant, Tyrone Power, her lover. In a climactic twist, Dietrich kills Power when she discovers that he no longer loves her—before ultimately being represented by Laughton in her own murder trial.
>
> There comes a point in a trial when advocacy skill, knowledge of the law, and professional responsibility uniquely come together. This is also the time when the adversarial nature of our system is clearest. This point occurs when a witness is impeached with a prior inconsistent statement, as portrayed dramatically in the Laughton-Dietrich confrontation. This essay supports the assertion that witness impeachment is an indispensable part of the common law justice system, returning from time to time to the movie, *Witness for the Prosecution*.

2. A prior inconsistent statement is one of the best ways to attack the credibility of a witness because when people are lying, they cannot remember what they said on previous occasions

    a. As Mark Twain said, "one need not have a good memory if one tells the truth."

        1) If you have witnesses or evidence that will contradict the witness, then set the witness up to testify positively about the instance knowing full well you have someone or some document which will prove the contrary

    b. Read MRE 607, 612, 613, 801, 806

3. 2 types

    a. Impeachment which advances the theory of the defense

    b. Impeachment to show that the witness is contradicting himself

    c. For both types, do not ask the witness if he "remembers" the PCS. Use leading questions to say that the witness made the PCS

4. Method of impeachment to show that the witness cannot be believed because he cannot keep the story straight

    a. Commit the witness to the specific facts (Recommit)

    b. Confront the witness with the inconsistent statement (Validate)

        1) Lay foundation to show that the other statement is reliable but not necessarily more reliable than the in-court statement

    c. Complete the impeachment (Confront)

5. Method of impeachment to persuade the jury to believe the prior inconsistent statement

    a. Confront the witness with the inconsistent statement (Recommit)

        1) Do not commit the witness to the specific facts

        2) Lay foundation to show that the other statement is the most trustworthy statement ever made

    b. Complete the impeachment (Confront)

6. Categories of Prior Inconsistent Statements

    a. Transcript of Prior Testimony

        1) You may want to submit a redacted copy of the prior testimony as an exhibit in the defense case. The prior consistent statement comes in for the truth because it was under oath. *See,* MRE 801(d)(1)(A); Gray v. United States, 589 A.2d 912, 915 (D.C. 1991); United States v. Dennis, 625 F.2d 782, 795 (8th Cir. 1980).

    b. Oral Statement

        1) If the witness agrees with the other statement, the impeachment is complete. If he disagrees, you need to call the police officer or your investigator or another witness to complete the impeachment

    c. Written Statement

        1) As with transcript, you are entitled to introduce a redacted copy of the

statement

7. Impeachment by Omission

   a. "Common law traditionally has allowed witnesses to be impeached by their previous failure to state a fact in circumstances in which that fact naturally would have been asserted." Jenkins v. Anderson, 447 U.S. 231, 239 (1980)

   b.. Example: On the standard form, the arresting officer in a DUI case notes that he smelled the odor of alcohol but said nothing about other indications of intoxication such as bloodshot eyes

   c. With omission, you probably do not want to introduce the document because it will more than likely contain prior consistent statements which will eliminate the impact of any omissions

8. MRE 806 - Attacking the credibility of a hearsay declarant with evidence of an inconsistent statement "is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain."

9. Nine **DON'Ts!** for Effective Impeachment Using a Prior Inconsistent Statement

   a. **Don't confront unless it is a true inconsistency.** Quibbling over a witness' choice of words sounds to a panel more like disingenuous fancy lawyering than substantive changes in a witness' recollection. A relevant point is either a main issue in the case or a point that reveals dishonesty in the witness' testimony.

   b.. **Don't be antagonistic toward the witness.** The foundation and confrontation flow more smoothly if questions are less accusatory and simply review facts. Thus, counsel appears more helpful to the panel and less rude to the witness.

   c. **Don't abbreviate the foundation to get to confrontation.** A detailed foundation with visual images (e.g., "And you raised your right hand to take an oath?") lends credibility to the prior statement and is especially important if counsel wants the jury not only to disbelieve the witness' testimony in court, but also to believe the substance of the prior statement.

   d. **Don't confront the witness by asking if he "*remembers* saying in a sworn statement . . . ."** This question misdirects the inquiry to whether the witness remembers and not whether he in fact made the prior statement. The witness can, in good faith, deny any memory and thus weaken the impeachment. Counsel should ask whether the witness *made* the statement.

e. **Don't summarize the prior statement.** Counsel must quote directly the particular words on the relevant point and show the jury by picking up the document and reading from it.

f. **Don't let the witness read from the document.** The witness may summarize, insert words, read another line, or stumble through the relevant line, any of which distract the jury from the inconsistency counsel desires to show.

g. **Don't let the witness explain the inconsistency.** Although MRE 613(b) requires that the witness be afforded an opportunity to explain or to deny the prior inconsistent statement, it is not an obligation of the counsel impeaching the witness. There is virtually no circumstance where counsel enhances the impeachment by asking, "How do you explain this inconsistency?" Leave it for opposing counsel's redirect examination, then on re-cross, when appropriate, move for admission of the prior inconsistent statement into evidence.

h. **Don't engage the other side in protracted examination.** Once counsel establishes an inconsistency, the government may use redirect to bring out an explanation for the inconsistency. Counsel impeaching the witness should save rebuttal for argument. Counsel can point out to the panel the government's effort to explain away problems in their case, but highlight what the witness said closer in time to the event in question - a point at which he was only trying to provide helpful information.

I. **Don't call the witness a liar.** The lawyer gains no advantage or favor for himself or his case by making personal attacks against a witness. The important point is what the witness said in the prior inconsistent statement, not whether he is lying, mistaken, or inaccurate now.

10. Sample Impeachment by Use of a Prior Inconsistent Statement

W (direct exam):	We had been drinking a little before he threw me on the bed and raped me. I only had about two beers, and I only drank at the barracks. But I never led him on.
πC:	No further questions.
ΔC:	You only drank two beers on July 10th? [*Reinforcement*]
W:	Yes.
ΔC:	You testified previously at a preliminary hearing about this matter, didn't you? [*Foundation*]
W:	Yes.
ΔC:	That was on July 29th, just a few weeks after the alleged rape?
W:	That's right.
ΔC:	And you took an oath at that hearing, raising your right hand

and promising to tell the truth, as you did today?

W: Yes.

ΔC: You testified truthfully at that hearing because you wanted to catch the person who you say raped you?

W: Yes.

ΔC: At that hearing, when asked how much you had to drink that day, you said, on page 7, line 15, (counsel reading from transcript) "I had about ten beers," didn't you? [*Confrontation*]

W: Yes.

ΔC: Now, you also talked about this incident to a police officer on July 10th, isn't that true? [*Foundation*]

W: Yes, when I reported it.

ΔC: And the police officer took a sworn statement from you?

W: Yes.

ΔC: You told him what happened on the same day it occurred, didn't you?

W: Yes.

ΔC: You told the police officer the truth so that the police officer could arrest someone?

W: Yes.

ΔC: When the statement was typed, you had a chance to review it and make corrections?

W: Yes.

ΔC: And then the police officer had you swear that the statement was true, and you signed it?

W: Yes.

ΔC: (picking up sworn statement) And in that statement to the police officer on July 10th, you said, on the second page, fourteen lines down, "we were sitting on the bed hugging and kissing," didn't you? [*Confrontation*]

W: No.

ΔC: [*Admission*] (Note: If counsel wants to argue the substance of the prior inconsistent statement, then counsel next has the witness authenticate her signature on the statement and moves to admit the document into evidence.)

ΔC: No further questions.

In the above example, defense counsel *reinforced* the witness' testimony as to the quantity of alcohol consumed prior to impeaching the witness. On the second relevant fact, however, defense counsel skipped the *reinforcement* step to avoid having the witness repeat the damaging accusation that the accused "threw me on the bed and raped me." After reinforcing part of the testimony, defense counsel laid detailed *foundations* for the prior statements on both relevant facts, including

questions which showed that such statements were made closer in time to the event (thus enhancing the likelihood of their accuracy) and for the purpose of helping the investigation with accurate information. When *confronting* the witness, defense counsel directed the witness to a specific place in the document which contained the prior inconsistent statement. Thus, defense counsel showed the jury that he was bringing out specific information to help the court, and not playing meaningless word games with the witness. When defense counsel got the witness to admit having made the prior inconsistent statement, he stopped his examination on that point, leaving any explanation to the government.

The most important step in impeaching a witness with prior inconsistent statements is the diligent investigation and examination to locate and to develop prior statements. Once defense counsel has built an arsenal of prior statements through investigation and good pretrial questioning, defense counsel should organize to test the witness' testimony at trial against his prior statements. By exposing such inconsistencies and confronting the witness with them, defense counsel shows the jury that the witness' testimony in court is not worthy of belief, having changed on a relevant point.

(¶¶ 9 & 10 adapted from **The Art of Trial Advocacy** *Faculty, The Judge Advocate General's School, U.S. Army*, FEBRUARY 1998 THE 36 ARMY LAWYER • DA PAM 27-50-303)

11. For general tips on impeachment, see "Impeachment" by Michele LaVigne and Craig Mastantuono, The Wisconsin Defender, Fall 2005, Volume 13 , Issue 3 at http://www.wisspd.org/html/publications/WdefFall2005/Impeachment.pdf

C. False Evidence, Defense Counsel and the Duty of Advocacy

1. Montana Rule of Professional Conduct 3.3 Candor Toward the Tribunal

   a. (a)(3) "A lawyer shall not knowingly:.....offer evidence that the lawyer knows to be false. If a lawyer, *the lawyer's client, or a witness called by the lawyer* has offered material evidence and *the lawyer* comes to know of its falsity, the lawyer shall take reasonable remedial measures, *including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false*." (Italics reflect amendments effective April 1, 2004)

2. ABA Standards for Criminal Justice The Defense Function (1993) Standard 4-7.5 Presentation of Evidence:

   a. "(a) Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity."

3. DC Bar Opinion 234 - Applicable Rule 3.3 (Candor Toward the Tribunal):

    a. "Defense Counsel's Duties When Client Insists On Testifying Falsely
    Rule 3.3(a) prohibits the use of false testimony at trial. Rule 3.3(b) excepts from this prohibition false testimony offered by a criminal defendant so long as defense counsel seeks first to dissuade the client from testifying falsely and, failing in this, seeks to withdraw when this can be done without harm to the client. Where a defendant has been incarcerated before trial and a continuance on the eve of trial would cause an extended delay of trial, the obligation to withdraw is removed. Instead, defense counsel may call the client to testify in narrative form, but may not assist the client in framing the client's false testimony. Nor may defense counsel argue a perjurious client's credibility in closing unless the client has given at least some truthful, relevant evidence."

4. NACDL Ethics Opinion No. 92-02

5. ABA Standards for Criminal Justice The Defense Function (1993) Standard 4-7.5 Examination of Witnesses:

    a. "(b) Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."

    b. United States v. Wade, 388 U.S. 218, 257-258) (1967) (White, dissenting).:

        "But defense counsel has no comparable obligation to ascertain or present the truth. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. More often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. As part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth."

6. Nix v. Whiteside, 475 U.S. 157 (1986)

    a. Held: Sixth Amendment right to counsel is not violated when defense counsel refused to cooperate with the defendant in presenting perjured testimony. Defense counsel's action fell within the range of acceptable conduct and as a matter of law the defendant cannot establish prejudice under Strickland v. Washington, 466 U.S. 668 (1984), because there is no right to testify falsely.